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Supreme Court, U.S.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1987

MARTIN ROMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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D6PPO

1. Whether time excluded from the running of the "speedy trial clock" while an indictment is pending may be retroactively tolled as to a count of a superseding indictment that should have been, but was not, contained in the original indictment?

List of Parties

The only parties in the court whose judgment is sought to be reviewed are those set forth in the caption of this case in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals is officially reported at 822 F.2d 261 (2d Cir. 1987) and is set forth in Appendix A, pp. 1a-13a.

The order of the United States Court of Appeals denying reargument and rehearing *en banc* is not officially reported, and is set forth in Appendix B, pp. 14a-16a.

The decision of the United States District Court is officially reported at 646 F.Supp. 1568 (S.D.N.Y. 1986) and is set forth in Appendix C, pp. 16a-26a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1987. A timely petition for reargument, with a suggestion for rehearing *en banc*, was denied on July 30, 1987.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

1. United States Constitution, Article 1, Section 9, Clause 3: "No . . . *ex post facto* law shall be passed."
2. United States Constitution, Fifth Amendment: "No person shall . . . be deprived of . . . liberty . . . without due process of law . . . ."
3. United States Constitution, Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."
4. 18 U.S.C. § 3161: "Speedy trial . . . [t]ime limits and exclusions.
   (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an . . . indictment shall commence within seventy days from the filing date . . . .
   (h) The following periods of delay shall be excluded in computing the time within which an . . . indictment must be filed, or . . . within which the trial . . . must commence:
   (6) If the . . . indictment is dismissed upon motion of the attorney for the Government, and thereafter a charge is filed against the defendant for the same offense, or an offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge."

5. Plan for Achieving Prompt Disposition of Criminal Cases - Southern District of New York.
Para. 4: "Time Within Which Trial Must Commence."
(a) Time Limits. The trial of a defendant shall commence not later than 70 days after . . . (1) the date on which an indictment . . . is filed in this district . . . .
(d) Superseding Charges. If, after a[n] . . . indictment . . . has been filed, a[n] . . . indictment is filed which charges the defendant with th[e same] offense [charged in the prior indictment], . . . (2) the trial shall commence within the time limit for commencement of trial on the original indictment . . . ."

Statement of the Case

Petitioner was arrested on April 22, 1986 and charged with conspiracy to possess and distribute a controlled substance (cocaine). During his arraignment and subsequent proceedings before the Magistrate on that charge, the prosecutor informed petitioner's counsel that unless petitioner pleaded guilty to the conspiracy charge he might indict him on a charge of engaging in a continuing criminal enterprise (hereafter "CCE").[1] Defense counsel responded that petitioner had always denied his guilt, but that he would relate the prosecutor's statement to his client.

As predicted by defense counsel, petitioner maintained his innocence and the prosecutor presented the case to the Grand Jury. Although (as the prosecutor subsequently conceded and the District Court found, 646 F.Supp. at 1569, n. 1) the prosecutor possessed all of the

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[1] Upon conviction of the conspiracy charge petitioner could have received a maximum sentence of 15 years and a fine of $25,000; upon conviction of the continuing criminal enterprise charge, the maximum sentence petitioner could have received was life in prison (without possibility of parole), a fine of $100,000 and forfeiture of any and all profits from such enterprise. Compare 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 with 21 U.S.C. § 848(a)(1), (2).

evidence necessary for presentation of the CCE charge, he chose not to present this evidence to the Grand Jury; instead, on May 6, 1986, he secured an indictment (86 Cr. 388, S.D.N.Y.) charging only conspiracy, distribution and possession.

After this indictment was returned, the prosecutor persisted in pressing petitioner to plead guilty and in holding the threat of indictment on the CCE charge over his head if he did not. Petitioner, however, continued to protest his innocence. Accordingly, on September 5, 1986, the prosecutor secured a superseding indictment (S 86 Cr. 388, S.D.N.Y.) adding a CCE count to the prior charges.

Shortly thereafter, defense counsel moved to dismiss the CCE charge on, *inter alia*, the ground that he had not been brought to trial within 70 days of the filing of the original indictment.

The District Court agreed with this argument. The court first held that the CCE charge was an offense "required to be joined" with the charges in the original indictment and that the "speedy trial clock" began running on the CCE charge as of the date of the filing of the original indictment. Next, the court held that time excluded from the running of that clock prior to the inception of the CCE count could not be "retroactively" applied to that charge; that holding was particularly required because of the prosecutor's deliberate delay in charging the CCE count and because an informed decision by counsel to request or acquiesce in an exclusion could only be made based on the charges *then* pending against his client. Since more than 70 days had passed since the filing of the original indictment, the CCE charge had to be dismissed. 646 F.Supp. at 1569-73.

The Court of Appeals reversed.[2] The court held that periods of time excluded under the initial indictment

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[2] On appeal by the prosecution, they did not challenge the District Court holdings that the CCE charge should have been brought as part of the original indictment or that the failure to do so started the speedy trial clock.

were to be retroactively applied to the CCE count of the superseding indictment, despite the fact that that charge had not been in existence when the prior exclusions had been made. 822 F.2d at 263-6.[3]

REASONS FOR GRANTING THE WRIT

I

The Decision of the Second Circuit, Retroactively Applying Speedy Trial Exclusions to Counts of a Superseding Indictment Which Were Not in Existence at the Time the Exclusions Were Made, Conflicts in Fact and Principle With Other Decisions of That Court, With Decisions of Other Circuits, and With Decisions of Various State Courts.

As the District Court in this case correctly stated, acceptance of the "retroactive tolling" argument would require a trial court to go back over exclusions granted under a prior indictment and attempt to determine, *ex post facto,* whether defense counsel, the prosecutor and/or the court would have done whatever they had done that gave rise to the exclusions in the first place had they known that other, possibly more serious, charges would subsequently be brought in a superseding indictment. 646 F.Supp. at 1573, n. 9. That would require precisely the "exercise in speculation" that numerous courts have held, in analogous situations, the parties "should not have to engage in." See, e.g., *United States v. Tunnessen,* 763 F.2d 74, 77-9 (2d Cir. 1985) ("Congress intended that the decision to grant [an exclusion] be prospective, not retroactive" in order to remove "the risk that a district judge may simply rationalize his action long after the fact, in order to cure an unwitting violation

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[3] Despite the District Court's reliance on the misconduct of the prosecutor, and despite the emphasis on that issue during and after oral argument, the decision of the Court of Appeals made no reference to this critical issue.

of the Act"). See, also, *United States v. Carey*, 746 F.2d 228, 230 (4th Cir. 1984) ("Recent cases uniformly hold that *nunc pro tunc* or retroactive continuances that are made after the expiration of the time within which the defendant should have been tried for reasons the judge did not consider before lapse of the allowable time are inconsistent with the Act [citations omitted]"). And see, *United States v. Novak*, 715 F.2d 810, 820 (3d Cir. 1983) (Court invokes "supervisory powers" to require prospective rulings on exclusions). *Cf. United States v. Massino*, 784 F.2d 153, 159 (2d Cir. 1986) (record of sealing/delay in sealing should be made contemporaneously to avoid "after-the-fact explanations . . . and eliminate the need for courts to rely long after the fact upon the memory of agents as to the reasons for delay. *Cf. United States v. Tunnessen* . . .").[4]

Although these cases were cited to the Second Circuit, they were ignored by that court in its opinion. Instead, the court cited a series of prior cases in which exclusions under prior indictments were "routinely" applied to superseding indictments. 822 F.2d at 265. Those cases, however, are distinguishable on two grounds.

In the first place, it does not appear that the argument made in this case was made in those cases. Accordingly, those cases do not contain any *holdings* relevant to this case. *Cf. Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (general expressions in prior cases must yield when precise point is later presented for decision).

Secondly, and perhaps of greater importance, it appears that the superseders in the cases cited by the Court of Appeals contained the same charges as the

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[4] Although *Tunnessen*, *Carey* and *Novak* dealt with the retroactive application of exclusions granted under the "ends of justice" section of the Speedy Trial Act (18 U.S.C. § 3161(h)(8)), the principle of those decisions is fully applicable to retroactive application of exclusions to new charges in superseding indictments, i.e., "after-the-fact" application of previously granted exclusions is simply improper.

prior indictments; in such situations, petitioner concedes that the prior exclusions carry over. In this case, however, the superseder contained a charge that was not, but should have been, in the prior indictment; as to that situation, petitioner contends that the prior exclusions do *not* carry over. The Second Circuit acknowledged that that situation had "*not* been previously discussed" (822 F.2d at 265), and petitioner contends that the Circuit's resolution thereof was not only not required by the cases it cited, but was also in conflict with the cases it ignored.

It also appears that the Second Circuit's ruling conflicts with decisions of the New York State courts. In *People v. Sinistaj*, 67 N.Y.2d 236 (1986), the Court of Appeals held that where new charges were contained in a superseding indictment periods of time excluded under a prior indictment would *not* be applied to the new charges. *Id.* at 241, n. 4. See, also, *People v. Osgood*, 52 N.Y.2d 37, 43-4 (1980); *People v. Cruz*, 123 Misc.2d 316, 322 (S.Ct. N.Y.Co. 1984), *aff'd on this ground*, 111 A.D.2d 725, 726 (1st Dept. 1985); and *People v. Gelfand*, 131 Misc.2d 268, 279 (S.Ct. K.Co. 1986), in all of which exclusions under prior indictments were held inapplicable to new charges in superseding indictments.[5]

It is respectfully submitted that certiorari should be granted to resolve the foregoing conflicts.

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[5] Neither the Federal Speedy Trial Act nor the New York State legislation on speedy trial (Criminal Procedure Law Article 30) deals with the issue of superseders or retroactive application of prior exclusions to new charges therein, and both the state and federal courts relied on general legal principles to decide these issues. Accordingly, the state court decisions provide an acceptable basis for deciding this issue of federal law.

II

The Decision of the Second Circuit Presents an Issue of Great Importance to the Administration of the Federal Criminal Law That Is Likely to Re-Occur and That Has Not Been Addressed by This Court.

As the Second Circuit conceded, the issue presented by this case — whether speedy trial exclusions made during the pendency of an indictment may be "retroactively" applied to new charges contained in a superseding indictment — is novel. 822 F.2d at 265. Despite its novelty, however, it is a question of great importance and is likely to re-occur.

It goes without saying that the proper construction of the federal Speedy Trial Act is obviously a matter of grave importance to the proper administration of the federal criminal law. While the lower courts may often be relied upon to perform that task, that is not the case here. In *United States v. Rojas-Contreras*, 106 S.Ct. 555 (1985), this Court (per Justices Blackmun and Brennan, concurring) noted that the "[Speedy Trial] Act nowhere refers to a superseding indictment." *Id.* at 559. Consequently, this Court had to grant certiorari to properly resolve an issue relating to such superseders. The same is true here.

Furthermore, while this case may present the first federal appellate decision in this area, the issue will definitely re-occur. Superseding indictments have become the rule, not the exception, and it is the rare federal case that is tried on the first indictment. See, e.g., COHEN, Superseding Indictments - New Device for Prosecutors, N.Y.L.J. August 14, 1987, p. 1, cols. 3-4. This practice is being followed in most states, whose speedy trial rules — having been modeled after the federal Act — also contain no reference to superseding indictments and no clear answers to the question raised by this case.

In sum, to forestall a host of possibly conflicting decisions, as well as to promptly decide this important issue, this

Court should grant certiorari. *Cf. Miller v. Florida*, 107 S.Ct. 2446 (1987) (certiorari granted to resolve issue of propriety of retroactive application of sentence guidelines to crime committed prior to enactment thereof).

It is also respectfully submitted that certiorari is particularly called for here because the Court of Appeals' decision is wrong.

A superseding indictment may contain one or more of three kinds of charges: the same charge that was in the original indictment and/or a related charge that was required to be joined with the prior charge and/or a completely new charge. *United States v. Rojas-Contreras, supra* at 559 n. 1 (1985). As to the first type of charge, the 70-day trial clock (see 18 U.S.C. § 3161(c)[1]) is treated as though it began running when the original indictment was filed, and all of the exclusions thereunder carry over to the identical counts of the superseder. As to the last type of charge, a new 70-day clock begins to run from arraignment on the superseder, and the prior exclusions are not applicable to the new counts of the superseder. As to the remaining situation — the one involved in this case — the 70-day clock is treated as though it began running when the original indictment was filed, *but* the prior exclusions are inapplicable to the previously uncharged counts of the superseding indictment.

Such a hybrid solution is called for by virtue of the fact that this is a hybrid situation. On the one hand, the continuing criminal enterprise charge was an offense "required to be joined" with the conspiracy and substantive charges brought in the original indictment; therefore, it makes perfect sense that the 70-day clock runs from the date of the first indictment, as that is when the offense should have been charged (see Plan for Prompt Disposition of Criminal Cases for the Southern District of New York, Para. 4(d)[2]). On the other hand, because it is a different offense than that with which the petitioner was previously charged, it also makes perfect sense not to retroactively apply to this new charge the exclusions granted while only the other charges were

pending That is so because there is no basis for presuming that the circumstances that gave rise to the exclusions while only the former charges were pending would have given rise to those exclusions had the newly-charged offense then also existed. As a matter of fact, as petitioner's counsel contended and as the district court recognized, in many cases the exclusions would *not* have been requested, and/or acquiesced in, by the defense. 646 F.Supp. at 1573, n. 9. ("Defendant has asserted, '[H]ad the CCE count existed from the beginning, defendant's entire posture would have changed . . .' It is possible, for example, that defendant would have moved for a severance under § 3161(h)(7). Defendant has also maintained that the presentation of his case would have been enhanced by a more expeditious trial on the CCE charge").

In sum, a defendant can only make intelligent decisions on how to prepare his defense based on the charges *then* in existence; in the context of this case, that means that a defendant can only determine how to proceed vis-a-vis requests for and/or acquiescence in Speedy Trial Act exclusions based on the charges in the indictment he is actually facing.

The Court of Appeals rejected petitioner's argument based on its reading of 18 U.S.C. § 3161(h)(6) and its holding that petitioner's position would force the prosecution to bring charges prematurely. 822 F.2d at 266. Neither of these grounds withstands analysis.

Section 3161(h)(6) merely provides that where an indictment is dismissed by the prosecution and a superseding indictment is subsequently filed, the time between these two events is excluded. That provision is irrelevant to this case for two reasons. First of all, the superseder here was filed while the original indictment was still pending so there was no hiatus period to exclude. Secondly, and perhaps of greater importance, that section simply has nothing to do with whether periods excluded under the first indictment can carry over to new charges in a superseder. See, also, *Cohen, supra* (where govern-

ment improperly tried to have indictment dismissed under (h)(6) to avoid running of speedy trial clock motion would be denied).

The Court of Appeals' additional argument that acceptance of petitioner's position would force prosecutors to bring charges prematurely is both generally and specifically incorrect. Since the prosecutor controls the time when a case will be presented to a Grand Jury, and, therefore, the time when the speedy trial clock begins to run, there is simply no basis for any fear that charges will be prematurely brought. Even in those situations (rare in the federal courts) where an arrest precedes an indictment and requires indictment within a specified period of time, numerous provisions in the Speedy Trial Act provide for exclusions if additional time is necessary to prepare for indictment or trial. See, e.g., § 3161(h)(3), (6), (8). In any event, any generalized fear of premature prosecution has no place in this case where, as the District Court found, "the Government admitted that it would have been possible to bring the CCE charges at the same time as the original charges." 646 F.Supp. at 1509, n. 1.

One last matter needs to be noted. Petitioner submits that there is something fundamentally improper in allowing a prosecutor to deliberately fail to request indictment on charges he has full knowledge of, to hold those charges over the head of a defendant who protests his innocence in an attempt to coerce a plea to lesser charges, and then to benefit from that misconduct by getting additional time to try the delayed charges. See, e.g., ABA Standards Relating to the Prosecution Function and the Defense Function, § 2.9(a) ("It is unprofessional conduct for a prosecutor intentionally to use procedural devices for delay for which there is no legitimate basis"), and Commentary thereto at 71-3.

The District Court found that such misconduct has occurred and based both the dismissal and the sanction ("with prejudice") thereon. 646 F.Supp. at 1569, n. 1, 1573, n. 9, and 1574, n. 10. Furthermore, this matter was

extensively briefed by both sides on appeal, consumed virtually the entire oral argument, and generated post-argument submissions. It is respectfully submitted that the Court of Appeals' decision was silent on this matter because if it had been addressed the dismissal would had to have been upheld. See, e.g., *Blackledge v. Perry*, 417 U.S. 21 (1974) (superseding indictment must be dismissed where obtained to punish defendant for exercise of constitutional rights).

Conclusion

For the above stated reasons, the petition for a writ of certiorari to the United States Court of Appeals should be granted, and the order of that Court reversed.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 948—August Term 1986

Argued: March 31, 1987 Decided: June 22, 1987

Docket No. 86-1521

UNITED STATES OF AMERICA,

Appellant,

—against—

MARTIN ROMAN,

Defendant-Appellee.

Before:

FEINBERG, PRATT, and ALTIMARI,

Circuit Judges.

Interlocutory appeal from an order entered November 14, 1986, in the Southern District of New York, Peter K. Leisure, *Judge*, dismissing with prejudice, on speedy trial grounds, one count of a superseding indictment.

Reversed and remanded.

BRUCE A. BAIRD, New York, NY, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron R. Marcu, Assistant United States Attorney, of Counsel), *for Appellant*.

JOEL A. BRENNER, New York, NY (Kenneth Joelson, Bobick, Joelson & Rochkind, New York, NY, of Counsel), *for Defendant-Appellee*.

PRATT, *Circuit Judge*:

The United States of America appeals, pursuant to 18 U.S.C. § 3731, from an order of the United States District Court for the Southern District of New York, Leisure, *J.*, dismissing with prejudice, on speedy trial grounds, one count of a superseding indictment charging appellee Martin Roman with managing a continuing criminal enterprise ("CCE") to distribute heroin in violation of 21 U.S.C. § 848. Roman moved to dismiss the CCE charge, which was first asserted as part of the superseding indictment, on the ground that his right to be tried within 70 days following arraignment on the original indictment had been violated, even though, due to certain exclusions, the speedy trial clock had not yet run out on the original indictment.

The district court concluded that the CCE charge was "required to be joined with" the conspiracy charge of the

original indictment, and that the 70-day speedy trial clock therefore commenced to run on the CCE charge with the date of arraignment on the original indictment, but that the exclusions of time under 18 U.S.C. § 3161(h), which had been applied to the original indictment, should not be applied to the additional CCE charge in the superseding indictment. Accordingly, the district court dismissed the CCE count with prejudice. For the reasons set forth below, we reverse and remand.

BACKGROUND

On May 6, 1986, the grand jury returned against Martin Roman an eight count indictment charging him with conspiring to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 846, and with distributing and possessing with intent to distribute heroin in violation of 21 U.S.C. § 841(b)(1)(B). Roman was arraigned on May 15, 1986.

While the original indictment was pending, various periods of time were excluded from the 70-day period within which the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), requires trial to commence. The exclusions were granted because some of Roman's co-defendants were unavailable and because defendants made several pretrial motions.

On September 5, 1986, when 48 days still remained on the speedy trial clock, the grand jury returned a superseding indictment that essentially restated the original charges against Roman and added, in count two, a charge of managing a continuing criminal enterprise engaged in the distribution of heroin, in violation of 21 U.S.C.

§ 848. The conspiracy and distribution charges remained as independent counts and were also incorporated in the new CCE charge as predicate acts.

On October 1, 1986, Roman moved to dismiss the new count two on the ground that 70 speedy trial days had passed without the commencement of trial. 18 U.S.C. § 3161(c)(1). He argued that the CCE count was an offense required to be joined with the charges in the original indictment and that he was, therefore, entitled to be tried on that count within 70 days of his arraignment on the original charges.

In opposition the government argued first that the speedy trial clock did not begin to run with respect to the CCE count until the superseding indictment was filed. Alternatively, the government argued that even if the 70-day period for the CCE charge began to run when Roman was arraigned on the original charge, the time exclusions that had been applied to the charges in the original indictment should apply as well to the superseding indictment.

Roman conceded that the 70-day period had not expired with respect to the charges that appeared in the original indictment but argued, regarding the CCE charge, that "it makes little sense to suggest that speedy trial would be stayed as to charges which did not even exist during this period."

The district court agreed, holding that, under applicable double jeopardy principles, the CCE charge in the superseding indictment must be considered the same as, or required to be joined with, the conspiracy charge in the original indictment, so that the speedy trial clock began ticking for both at the same time: when Roman was

arraigned on the original indictment. The district court also rejected the government's argument that the exclusions granted under the original indictment should apply to the 70-day period for the CCE charge. The court therefore dismissed count two of the superseding indictment with prejudice on November 13, 1986, and, on December 22, 1986, denied the government's motion for reargument and reconsideration.

On this interlocutory appeal the issue is whether the speedy trial exclusions applied to the original indictment should apply as well to a superseding indictment that contains charges which, under double jeopardy principles, are required to be joined with the original charges. Because we conclude that 18 U.S.C. § 3161 should be interpreted to apply the original 70-day clock to the superseding indictment, complete with exclusions, we reverse and remand for further proceedings. We reach our decision based on the language of the statute, the Second Circuit Guidelines Under the Speedy Trial Act, relevant case law, the speedy trial plans of every district court in this circuit, common sense, and sound policy considerations.

DISCUSSION

The Speedy Trial Act requires a criminal trial to begin within 70 days of the later of indictment or arraignment. 18 U.S.C. § 3161(c)(1). *See United States v. Piteo*, 726 F.2d 50, 50 (2d Cir. 1983), *cert. denied*, 466 U.S. 905, 104 S. Ct. 1682 (1984).

Certain periods of delay are excluded in computing the 70-day period. 18 U.S.C. § 3161(h). Exclusions are commonly granted, for example, for the litigation and dispo-

sition of pretrial motions, § 3161(h)(1)(F), or due to the unavailability of a defendant or essential witness, § 3161(h)(3)(A). In addition, the court, on its own motion or at either party's request, may grant a continuance based on its finding that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). Thus, the act requires that the trial of an indicted defendant occur within 70 nonexcluded days from the date on which an indictment is filed, or from the date of the defendant's first appearance before a judicial officer, whichever is later.

Although the Speedy Trial Act contains no reference to a "superseding indictment", which is a second indictment filed before dismissal of the original, or underlying, indictment, there is an instructive provision in the act that covers an analogous situation. Section 3161(h)(6) applies when an indictment is dismissed on the government's motion and another charge "for the same offense, or any offense required to be joined with that offense" is filed. In that situation the act provides that the speedy trial clock is tolled during the period of time after dismissal, when no charges are pending, and on the new indictment the clock resumes from the point at which it stopped when the original indictment was dismissed. 18 U.S.C. § 3161(h)(6). *See United States v. McCown*, 711 F.2d 1441, 1446 (9th Cir. 1983) (under § 3161(h)(6), "the time period is merely tolled during the the period when no indictment is outstanding"). Thus, the statute provides that when reindictment follows dismissal the exclusions of time allowed under the first indictment continue to apply. We can discern no logical reason to apply a different rule

to a superseding indictment simply because it is filed sooner, while the first indictment is still pending.

In addition to the statutory language, the Second Circuit Guidelines Under the Speedy Trial Act are instructive because they focus specifically on superseding indictments. *See United States v. Rojas-Contreras*, 106 S. Ct. 555, 558 (1985) (using the guidelines to resolve the issue of whether the act prohibits commencement of a trial less than 30 days after arraignment on a superseding indictment).

These guidelines indicate that where the original indictment is pending when the subsequent charge is filed and the superseding indictment contains an "offense required to be joined with an originally charged offense", the offenses contained in the superseding indictment shall inherit both the 70-day time clock of the original indictment and the exclusions granted thereunder. The guidelines provide:

> 1. If, after an indictment * * * has been filed, [an] * * * indictment * * * ("subsequent charge") is filed which includes the same offense or any offense required to be joined with that offense ("originally charged offenses"), the time limits * * * applicable to the originally charged offenses will be determined as follows:
>
> * * * *
>
> (c) If the original indictment * * * is pending at the time the subsequent charge is filed, * * * [t]he trial of the originally charged offenses included in the subsequent charge shall commence within the time limit for commencement of trial on the original indictment * * *.

Judicial Council of the Second Circuit, Guidelines Under the Speedy Trial Act II (L)(1)(c) (approved Jan. 19, 1979) [hereinafter Second Circuit Guidelines]. The Comment to guideline II (L) further clarifies the treatment of "originally charged offenses" in a superseding indictment:

> [A]ssume that after [65] days of non-excluded time has run in the arraignment-trial interval and while the first indictment is still pending, a superseding indictment is handed up containing the same charges as well as new ones. Under guideline 1(c) above, the clock stops running until the arraignment on the new indictment has taken place. * * * [F]ollowing the arraignment on the superseding indictment, there are only five (5) days of non-excluded "arraignment-trial" interval time left for trial of those offenses in the superseding indictment that are contained in the original indictment.

Comment, Second Circuit Guidelines, Section II (L). Since the term "nonexcluded time" is used here to describe the original speedy trial days that are carried over to a superseding indictment, the exclusions granted under the original indictment are necessarily assumed to apply to the superseding indictment.

Defendant does not disagree with this analysis but, instead, would simply have this court disregard the Second Circuit Guidelines and in effect invalidate the speedy trial plans of all districts in this circuit. This we decline to do.

Four years after the passage of the original Speedy Trial Act, Pub. L. No. 93-619, 88 Stat. 2076 (1975), *amended by* Pub. L. No. 96-43, 93 Stat. 327, 328 (1979) *and* Pub. L. No. 98-473, 98 Stat. 2167 (1984), the Judicial

Council of the Second Circuit approved the Guidelines Under the Speedy Trial Act "for the guidance of the bench and bar and for the eventual inclusion in the Speedy Trial Act plan of each district court." Foreword, Second Circuit Guidelines. When the guidelines were adopted, the Judicial Council Speedy Trial Act Committee (Mansfield, *J.*, Oakes, *J.*, Gurfein, *J.*) emphasized that, although the guidelines "do not have the force of law * * * they have been drafted by * * * experienced judges, prosecutors, defense counsel, court officials, Speedy Trial Act reporters and academicians and represent their best judgment as to how various provisions of the Speedy Trial Act should be interpreted to achieve its purpose." *Id.* We have since recognized that the guidelines "are entitled to appropriate respect." *United States v. Todisco*, 667 F.2d 255, 260 (2d Cir. 1981), *cert. denied*, 455 U.S. 906, 102 S. Ct. 1250 (1982). *Cf. United States v. Sebastian*, 428 F. Supp. 967 (W.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1372 (2d Cir. 1978).

Shortly after the guidelines were approved, the judges of each district in the second circuit adopted speedy trial plans pursuant to congressional directive in the act itself, 18 U.S.C. §§ 3165-68. *See, e.g.*, United States District Court for the Eastern District of New York, *Plan for Prompt Disposition of Criminal Cases*, in Federal Bar Council, *Second Circuit Redbook* 343 (1984). Except for slight variations in language in the plan for the District of Connecticut, every district court in this circuit adopted the language of Second Circuit Guidelines II (L)(1)(c). *See, e.g., id.* Furthermore, these rules, unlike the guidelines themselves, have the effect of law. Given this background, when the guidelines and the statutory language

point in the same direction, as they do here, we are not inclined to strain to arrive at a contrary result.

This circuit's actual treatment of superseding indictments supports our conclusion. Although the issue before this court has not been discussed previously in this circuit, our courts have routinely applied exclusions granted under original indictments to superseding indictments. *See, e.g., United States v. Pagan*, 714 F.2d 225, 226-27 (2d Cir. 1983) (exclusions for pretrial motions under original indictment carried over to superseding indictment); *United States v. Piteo*, 726 F.2d 50, 52-53 (2d Cir. 1983) (court looked to original time clock, with exclusions, to determine if delay of defendant's trial due to joinder of co-defendant in superseding indictment was "reasonable" under § 3161(h)(7)), *cert. denied*, 466 U.S. 905, 104 S. Ct. 1682 (1984); *United States v. Bufalino*, 683 F.2d 639, 646 & n.9 (2d Cir. 1982) (exclusions for motions under original indictment carried over to superseding indictment), *cert. denied*, 459 U.S. 1104, 103 S. Ct. 727 (1983). In some cases where no violation was found, the results might have been different if the exclusions had not applied. *See, e.g., Pagan*, 714 F.2d 225; *Bufalino*, 683 F.2d 639.

The third circuit apparently shares our view on this issue. Where a defendant argued that the 70-day period applicable to the superseding indictment should be calculated from the filing of the original indictment, but that exclusions granted for motions pertaining to the original indictment should not be applied to the superseding indictment, the third circuit rejected the defendant's argument and stated, "[t]he appellant cannot have it both ways: if the Speedy Trial clock starts to run with the filing of the original indictment, it must stop for excludable

delays pertaining to that indictment." *United States v. Novak*, 715 F.2d 810, 813 (3d Cir. 1983), *cert. denied*, 465 U.S. 1030, 104 S. Ct. 1293 (1984).

Roman's argument that this case presents a "hybrid situation" is unconvincing. While conceding that the original 70-day trial clock, with exclusions, attaches when the superseding indictment contains the same charges as the original indictment, and that a new 70-day clock begins to run when the superseding indictment contains a completely new charge, Roman asserts that where the offense charged in the superseding indictment is one required to be joined with the charges in the first indictment, the original 70-day clock should attach *without* exclusions. The rationale offered for this "hybrid" solution is that the offense required to be joined under double jeopardy principles "should have been brought" when the first indictment was filed; therefore, the original 70-day clock applies. The exclusions should not apply, Roman argues, because where the superseding indictment charges a different offense than the original, "there is no basis for presuming that what gave rise to the exclusions under the other charges would have given rise to those exclusions under the new offense".

This attempt by Roman to create a unique slot for his case cannot, however, be harmonized with the result required by the statute when there is reindictment following dismissal. Congress could have distinguished, in 18 U.S.C. § 3161(h)(6), between an indictment containing the same offense as the original and one containing an offense required to be joined with the originally charged offense, but it did not do so. Roman fails to raise any cogent argument why the statutory treatment should

differ merely because the new indictment is filed during the pendency of the original, instead of after its dismissal.

Fairness to a defendant does not require that he be informed, at the time he takes positions regarding exclusions under the original indictment, of all charges that may ultimately be brought against him. On the contrary, Roman's interpretation of the act would, in effect, put pressure on the government to "bring in the original indictment all offenses required to be joined therewith", a result that would misconstrue the purpose and the language of the Speedy Trial Act. As we stated in *United States v. Hillegas*, 578 F.2d 453, 456 (2d Cir. 1978), "[t]he policy and purpose of the Act * * * [is] to expedite the processing of *pending* criminal proceedings, not to supervise the exercise by a prosecutor of his investigative or prosecutorial discretion" (emphasis in original).

The legislative history of the Speedy Trial Act indicates that Congress was concerned with both the rights of criminal defendants and the interests of society in general. The bill's purpose was "to give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses," S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974), and "to assist in reducing crime and the danger of recidivism by requiring speedy trials." H. Rep. No. 93-1508, 93d Cong., 2d Sess. 8 (1974). *Accord United States v. Stayton*, 791 F.2d 17, 19-20 (2d Cir. 1986) ("The Speedy Trial Act was designed to effectuate the interests of society in general and of the defendant in particular by ensuring that our courts mete out speedy justice." (citation omitted)); *United States v. Hillegas*, 578 F.2d at 456 n.3 (" 'A defendant who is charged with a violation of the law becomes a burden to society in the sense that his status consumes the time and energy of all components of

the criminal justice system with which he comes in contact: the police, magistrate, clerks of court, probation officers, judges and others.' " (citation omitted)).

As the legislative history and this circuit's interpretation of the purposes of the Speedy Trial Act confirm, congress was concerned generally with the efficient administration of justice, and with that goal in mind, decided that the government's prosecutorial flexibility should remain unfettered in this context. Forcing the government to bring charges prematurely would burden courts with weak cases and with applications for continuances, and thus tend to defeat the public interest and the central purpose of the act. *See Hillegas*, 578 F.2d at 460.

Reversed and remanded.

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of July one thousand nine hundred and eighty-seven.

UNITED STATES OF AMERICA,
Appellant,

-against-

MARTIN ROMAN,
Defendant-Appellee.

Filed July 30, 1987

Docket No. 86-1521

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for hearing be DENIED.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

It is further ordered that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requestd that a vote be taken thereon.

/s/ _____
Elaine B. Goldsmith
Clerk

Appendix C
Decision of United States District Court

UNITED STATES of America,

v.

Martin ROMAN, Defendant.

No. S 86 Cr. 388 (PKL).

United States District Court,
S.D. New York.

Nov. 13, 1986.

Defendant charged with drug offenses brought motion to dismiss count of indictment charging him with managing continuing criminal enterprise. The District Court, Leisure, J., held that continuing criminal enterprise charge contained in superseding indictment was same as, or required to be joined with, conspiracy charge contained in original indictment, and thus, 70-day speedy trial limit as to continuing criminal enterprise charge commenced with date of arraignment on original indictment.

Motion granted.

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y. (Charles G. Labella, Asst. U.S. Atty., New York City, of counsel), for U.S.

Bobick, Joelson & Rochkind, New York City (Kenneth Joelson, of counsel), for defendant Roman.

LEISURE, District Judge:

Indictment 86 Cr. 388, filed May 6, 1986, charged defendant Martin Roman, among others, with conspiracy to violate the narcotics laws as well as possession with intent to distribute heroin. Defendant was arraigned on May 15, 1986. On September 5, 1986, Superseding Indictment S 86 Cr. 388 was filed, restating the charges of the

original indictment against Roman and charging him for the first time with managing a Continuing Criminal Enterprise ("CCE") to distribute heroin in violation of 21 U.S.C. § 848.[1] The CCE charge, Count Two of the superseding indictment, incorporates as predicate acts the conspiracy and distribution charges. Defendant moves to dismiss Count Two on the ground that 70 days have passed without the commencement of trial. 18 U.S.C. § 3161(c)(1).

Speedy Trial Act

Defendant asserts that he was entitled to be tried on the CCE charge within 70 days following arraignment on the original indictment.[2] The Government, on the

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[1] With the exception of the CCE charge, the superseding indictment against Roman is basically unchanged from the original indictment although four of the distribution counts have been upgraded into "school counts" (and two others have been omitted), 21 U.S.C. § 845a, and a forfeiture count has been included, 21 U.S.C. § 853(a). At oral argument, the Government admitted that it would have been possible to bring the CCE charge at the same time as the original charges, since the original and superseding indictments involve the same conduct and evidence.

Defendant argues that the CCE count should be dismissed on the ground that, as a matter of law, the evidence will not prove that Roman received "substantial income or resources" as a result of the conduct of a criminal enterprise, 21 U.S.C. § 848(b)(2)(B). Defendant argues that his receipt of approximately $25,000 falls below the intended Congressional standards. Defendant's Memorandum of Law at 8-11. It is unnecessary to address this issue in view of the following conclusions.

[2] In his Memorandum of Law in Support of his Motion to Dismiss Count Two, defendant also argues that Count Two should be dismissed because the superseding indictment came more than 30 days after his arrest. In his Reply Memorandum of Law, however, defendant conceded that *United States v. Napolitano*, 761 F.2d 135, 137-38 (2d Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 129, 88 L.Ed.2d 106 (1985), is controlling on this issue. *Napolitano* held that

(footnote continued on following page)

other hand, contends that the speedy trial clock with respect to the CCE count did not begin to run until the filing of the superseding indictment. In *United States v. Ramos*, 588 F.Supp. 1223 (S.D.N.Y. 1984), *aff'd*, 779 F.2d 37 (2d Cir. 1985) the Court addressed this issue without deciding it. Following local guidelines, the Court stated that the key issue is whether the subsequent filing contains "'the same offense or any offense required to be joined with' the offense charged in the original filing." *Id.* at 1226-27. See "Guidelines Under the Speedy Trial Act" for the Court of Appeals for the Second Circuit (the "Guidelines"), Para. II(L)(1)(c); "Plan for Prompt Disposition of Criminal Cases" for the Southern District of New York (the "Plan"), Para. 4(d)(2). "[I]f the subsequent filing does charge the same offense or one required to be joined therewith . . . then the speedy trial period commenced with the original filing." *Id.* at 1227[3]

(footnote continued from preceding page)
the 30-day rule requires dismissal only of the charges in the original complaint, even if additional charges not contained in the complaint arise out of the same criminal episode charged in the complaint. *Id.* An exception under *Napolitano*, which is not applicable here, may occur when the subsequent charge merely "gilds" the original one. *Id.* at 138.

[3] Both parties in this case agree that portions of the Guidelines are relevant, and that the issue is whether the CCE count contained in the superseding indictment is properly classified as *the same offense or an offense required to be joined with* the charges in the original indictment. *See* Government's Memorandum of Law at 5; Defendant's Memorandum of Law at 6. The Government has cited a portion of the commentary to the Guidelines which it asserts is controlling. Government's Memorandum of Law at 5. The Guidelines do not have the force of law, but are entitled to appropriate respect. *United States v. Todisco*, 667 F.2d 255, 260 (2d Cir. 1981), *cert. denied*, 455 U.S. 906, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982). Unfortunately, while the text of the Guidelines refers to "the same offense or any offense required to be joined with that offense" as "originally charged offenses," Guidelines at Para. II(L)(1), the commentary speaks of "original charges" and "new charges." Guidelines at 29-31. Thus, it is

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Appendix C
Decision of United States District Court

[1] In *Ramos*, the Government argued that the requirements of the Double Jeopardy Clause of the Fifth Amendment determine whether the subsequent filing charges the same offense or an offense required to have been joined with the charges of the original indictment.[4] 588 F.Supp. at 1227. In this case, defendant admits that double jeopardy standards govern. Reply Memorandum at 2. As the *Ramos* court noted, the Second Circuit has yet to construe the term "same offense or [one] required to be joined with that offense." 588 F.Supp. at 1227. The same language, however, appears in the section of the Speedy Trial Act providing for circumstances involving a subsequent indictment. § 3161(h)(6).[5] The Speedy Trial

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not clear for the purposes of the commentary whether all additional charges should be considered "new charges," or whether only those not required to be joined in the original indictment are "new charges." Moreover, the plain meaning of the text of both the Guidelines and the Plan opposes the Government's interpretation of the commentary to the Guidelines. *Cf. United States v. Rojas-Contreras*, ___ U.S. ___, 106 S.Ct. 555, 559 n. 1, 88 L.Ed.2d 537 (1985) (Blackmun, J., concurring in judgment) ("It is not obvious under the Guidelines whether a modified charge . . . would be treated the same as the original charge. . . ."). Therefore, the commentary to the Guidelines is not dispositive of this case.

[4] In its papers, the Government did not address the question of the applicability of double jeopardy standards. The Government argued that the CCE count is a new charge because: (i) under the CCE count the Government must prove other elements in addition to those required to prove the charges contained in the original indictment; and (ii) the maximum penalties for the charges in the original indictment differ substantially from those resulting from a CCE conviction. Government's Memorandum of Law at 5-6. At oral argument, the Government conceded that double jeopardy principles are relevant.

[5] "The term 'superseding indictment' refers to a second indictment issued in the absence of a dismissal of the first." *United States v. Rojas-Contreras*, ___ U.S. ___, 106 S.Ct. 555, 559, 88 L.Ed.2d 537 (1985) (Blackmun, J., concurring in judgment). Section 3161 does not have a provision directly applicable to superseding indictments. *Id; Ramos*, 588 F.Supp. at 1226.

Act does not define the term, but the legislative history makes clear that it refers to joinder required by "the constitutional doctrine of double jeopardy." S.Rep. No. 96-212, 96th Cong., 1st Sess. 10 (1979) ("[J]ust as the defendant should not profit from delay he can create for his own tactical advantage, neither should the Government."). *Accord United States v. Novak,* 715 F.2d 810, 817 (3d Cir. 1983), *cert. denied,* 465 U.S. 1030, 104 S.Ct. 1293, 79 L.Ed.2d 694 (1984). Thus, the question is whether, within the meaning of the Double Jeopardy Clause, the charge contained in the superseding indictment is the same as, or required to be joined with, charges contained in the original indictment. 715 F.2d at 817.[6] *See also United States v. Simms,* 508 F.Supp. 1175, 1177 (W.D.La. 1979) (Superseding indictment charged substantially the same offenses, and therefore defendant must still be tried within the period of time required from the date of the original indictment); *United States v. Bergdoll,* 412

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[6] Several other courts have recognized that under certain circumstances the trial date for additional charges in a superseding indictment may be measured according to the date of the original indictment; these courts, however, have applied tests other than those suggested by double jeopardy principles. *See, e.g., United States v. DeTienne,* 468 F.2d 151, 155 (7th Cir. 1982), *cert. denied,* 410 U.S. 911, 93 S.Ct. 974, 35 L.Ed.2d 274 (1973). ("[I]f the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest . . . [then] the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses."). *DeTienne,* however, was decided before the "required to be joined with" language was enacted. *Ramos,* 588 F.Supp. at 1228. *See also United States v. Andrews,* 790 F.2d 803, 809 (10th Cir. 1986); *United States v. Nixon,* 634 F.2d 306, 309 (5th Cir.), *cert. denied,* 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981); *United States v. Peters,* 587 F.2d 1267, 1275 (D.C.Cir. 1978). In view of the legislative history discussed above and of the inherent uncertainty of these alternative tests, reference to double jeopardy standards is appropriate.

The one Court that has reached a directly contrary conclusion on this issue clearly overlooked the legislative history discussed above. *United States v. Hencye,* 505 F.Supp. 968, 971 (N.D.Fla. 1981).

F.Supp. 1308, 1320 (D.Del. 1976) (Additional charge of CCE in the superseding indictment does not alter speedy trial rights of defendant; "[o]therwise, the government, by manipulating the grand jury process, could defeat defendants' speedy trial rights by the mere charade of new indictments.")[7]

[2] The Double Jeopardy Clause offers a defendant two basic protections: It protects against multiple prosecutions for the same offense after acquittal or conviction, and it protects against cumulative punishment for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 2540, 81 L.Ed.2d 425 (1984) (citations omitted). In this case, defendant contends that the CCE charge should be considered the same offense as, or required to be joined with, both the distribution and conspiracy counts of the original indictment. *See* Defendant's Memorandum of Law at 5. Thus, in resolving the speedy trial issue here according to double jeopardy principles, there are four distinct questions.

Is the CCE charge considered the same as, or required to be joined with, the original indictment's charge of:

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[7] *Cf. United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971) (Harlan, J.) (Delay of trial implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee); *United States v. Ottley*, 439 F.Supp. 587, 591 (S.D.N.Y. 1977) (acknowledging relationship between double jeopardy provision and speedy trial prosecutions as restraints on prosecutorial discretion).

In stating that it would be "absurd" to start the speedy trial clock on a charge *required* to be joined in the original indictment before such charge was in fact "returned by the grand jury," Government's Memorandum at 4, the Government ignores the prosecutor's relationship to the grand jury. "The contemporary grand jury investigates only those whom the prosecutor asks to be investigated, and by and large indicts those whom the prosecutor wants to be indicted." M. Frankel & G. Naftalis, *The Grand Jury: An Institution on Trial* 100 (1977).

(1) *distribution*, under the protection against
  (a) multiple prosecutions? or
  (b) cumulative punishment?
(2) *conspiracy*, under the protection against
  (a) multiple prosecutions? or
  (b) cumulative punishment?

(1)(a) Regarding the double jeopardy protection against multiple prosecutions, the critical inquiry is whether the CCE offense is considered the "same offense" as one or more of its predicate offenses. *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 2415, 85 L.Ed.2d 764 (1985); *cf. United States v. Persico*, 620 F.Supp. 836, 844 (S.D.N.Y.), *aff'd*, 774 F.2d 30 (2d Cir. 1985). Roman argues that both the distribution and conspiracy predicate charges are lesser included offenses under the CCE count, and that the Government would thus be prohibited from trying defendant for the greater offense after convicting him of the lesser one. *Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S.Ct. 2221, 2226-27, 53 L.Ed.2d 187 (1977). In *Garrett*, 105 S.Ct. at 2415-19, however, the Supreme Court clearly rejected precisely this argument with respect to substantive offenses such as possession with intent to distribute, 21 U.S.C. § 841(a)(1). The Court stated that Congress' intent to create the CCE as a separate offense "could hardly be clearer." *Id.* at 2413. Moreover, the Court stated that it would be "illogical" to construe the statute to require the Government to choose between prosecuting the predicate offenses and the CCE violation. *Id.* at 2415. "Quite obviously the CCE offense is not, in any commonsense or literal meaning of the term, the 'same' offense as one of the predicate offenses." *Id.*

(1)(b) *Garrett* also resolves the second issue. The Court stated that "logic supports the conclusion, also indicated by legislative history, that Congress intended separate punishments for the underlying substantive

predicates and for the CCE offense." *Id.* at 2420. *Accord United States v. Mourad,* 729 F.2d 195, 203 (2d Cir.), *cert. denied,* 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984).

(2)(a) The third issue concerns the relationship between the conspiracy charge, 21 U.S.C. § 846, and the CCE count for the purpose of the double jeopardy protection against multiple prosecutions. It was unnecessary for the Court in *Garrett* to decide this issue, as the defendant there challenged only the use as a predicate offense of his prior conviction for marijuana importation and his consecutive sentences for that substantive offense and the CCE charge. 105 S.Ct. at 2411. An earlier plurality opinion also failed to reach this issue. *Jeffers v. United States,* 432 U.S. 137, 155, 157, 97 S.Ct. 2207, 2218, 2219, 53 L.Ed.2d 168 (1977).

One Circuit Court of Appeals, however, has interpreted the *Garrett* opinion as extending to cases involving conspiracy as a predicate offense. *United States v. Grayson,* 795 F.2d 278, 285 (3d Cir. 1986) (Rationale and conclusions of *Garrett* are equally applicable to predicate conspiracy offense.) Other circuits have rejected this interpretation of *Garrett,* however. *United States v. Burt,* 765 F.2d 1364, 1368-69 (9th Cir. 1985) (distinguishing between predicate substantive offenses and conspiracy); *United States v. Erwin,* 793 F.2d 656, 669 & n. 20 (5th Cir. 1986) (same); *United States v. Boldin,* 772 F.2d 719, 730-31 (11th Cir. 1985), *modified on other grounds,* 779 F.2d 618 (11th Cir.), *cert. denied,* ____ U.S. ____, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986) (same); *United States v. Schuster,* 769 F.2d 337, 341, 344 (6th Cir. 1985), *cert. denied,* ____ U.S. ____, 106 S.Ct. 1210, 89 L.Ed.2d 322 (1986) (same). The Court of Appeals for the Second Circuit has yet to apply *Garrett* in the CCE context, *cf. United States v. Persico,* 774 F.2d 30, 32 (2d Cir. 1985), but its prior decisions indicate that it would reject the Third Circuit's expansive view of *Garrett.*

Appendix C
Decision of United States District Court

Prior to *Garrett*, the Second Circuit clearly distinguished between conspiracy and substantive predicates for a CCE charge. *Mourad*, 729 F.2d at 202-03. Moreover, it has repeatedly been held in the Second Circuit that conspiracy is a lesser included offense under a CCE charge. *United States v. Young*, 745 F.2d 733, 749-50 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985) (Conspiracy is a lesser included offense of CCE "in the purest form."). *See also United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir. 1977) (These two offenses are "the same in law and in fact."); *United States v. Estrada*, 751 F.2d 128, 133-35 (2d Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 97, 88 L.Ed.2d 79 (1985); *United States v. Martinez-Torres*, 556 F.Supp. 1255, 1260-65 (S.D.N.Y. 1983). In the absence of clear language to the contrary, this Court must follow *Young*, which reaffirmed *Sperling*. 745 F.2d at 750.[8] Thus, for the purpose of the double jeopardy protection against multiple prosecutions, the CCE charge must be considered the same as the conspiracy charge.

(2)(b) *Garrett* approved the plurality view in *Jeffers* that Congress did not intend to impose cumulative penalties under §§ 846 and 848. 105 S.Ct. at 2420; 432 U.S. at 157, 97 S.Ct. at 2219. In addition, the Second Circuit had clearly reached this result prior to *Garrett*. *See Mourad*, 729 F.2d at 202.

[3, 4] In view of the foregoing conclusions regarding double jeopardy principles, the CCE charge contained in the superseding indictment must be considered the same as, or required to be joined with, the conspiracy charge contained in the original indictment. The 70-day speedy

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[8] In a letter dated November 12, 1986, the Government conceded that "the conspiracy count charged in the indictment is a lesser included offense within the charge of managing a continuing criminal enterprise ('CCE')."

trial limit thus commenced with the date of arraignment on the original indictment.[9]

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[9] The Government has argued principally that the 70-day period for commencement of trial on the CCE charge began at the time of the filing of the superseding indictment. Government's Memorandum of Law at 4-5. This position resulted from the conclusion that the CCE count was "a new charge and not an offense required to be joined with the charges contained in the original indictment." *Id.* at 5.

The Government, however, has also argued—assuming the 70-day period as to the CCE charge began at the time of arraignment on the original indictment because the CCE offense was required to be joined with the original charge—that the 70-day period for the CCE count still has not elapsed. *Id.* at 6. This conclusion rests on the premise that exclusions of time under § 3161(h) which had been applied to the charges actually appearing in the original indictment should also toll the 70-day period as to the CCE charge, which was required to be joined in the original indictment, but appeared for the first time in the superseding indictment.

Defendant argues that the 70-day period for commencement of trial began with arraignment on the original indictment, and that the 70 days following the arraignment should be counted without regard to exclusions of time which were applied to the charges of the original indictment before the superseding indictment was filed. Reply Memorandum at 3-4.

In support of its retroactive tolling argument, the Government has relied on *Ramos*, 588 F.Supp. at 1228. This reliance, however, is misplaced. In calculating the time which had expired, from March 2 to May 9, 1986, prior to the filing of the superseding indictment, the Court simply counted each day without regard to any exclusions of time. *Id.* The only exclusions of time which the Court considered were applied after the filing of the superseding indictment. *Id.* In this case, nearly four months passed from the arraignment on the original indictment on May 15 to the filing of the superseding indictment on September 5, 1986.

The Government has also relied on provisions of the Guidelines, at Para. II(L)(1)(c), and the Plan, at Para. 4(d)(2) (The trial "shall commence within the time limit for commencement of trial on" the original indictment.) While these provisions can be construed as *implying* that retroactive tolling occurs, they do not explicitly address

(footnote continued on following page)

Appendix C
Decision of United States District Court

(footnote continued from preceding page)
the issue. Particularly as to waivers by the defendant under § 3161(h)(8), which are among the exclusions that were applied to the original indictment, the treatment proposed by the Government would be patently unfair. Defendant has asserted, "[H]ad this CCE count existed from the beginning defendant's entire posture toward insisting on an immediate trial would have changed." Reply Memorandum of Law at 4. It is possible, for example, that defendant would have moved for severance under § 3161(h)(7). Defendant has also maintained that the presentation of his case would have been enhanced by a more expeditious trial on the CCE charge. In any event, the Government's position entails "an exercise in speculation that this court should not have to engage in." *Id.; Cf. United States v. Tunnessen*, 763 F.2d 74, 78 (2d Cir. 1985) (citing dangers of retroactive application of exclusion of time under § 3161(h)(8)). Moreover, the Government should not now benefit from exclusions of time that were applied to the original charges while the Government stood by without action regarding a CCE offense. *Cf. United States v. Nixon*, 779 F.2d 126, 131 (2d Cir. 1985) (It would be "unfair" for defendant "to benefit retroactively" from silence regarding change of position); *United States v. Bufalino*, 683 F.2d 639, 646 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104, 103 S.Ct. 727, 74 L.Ed.2d 952 (1983) (Defendant "had a duty to do more than stand by without taking a position and then reap the benefit of inaction. . . ."). Acceptance of the Government's premise would substantially vitiate the prosecutor's incentive to bring in the original indictment all offenses required to be joined therewith. In view of these considerations, the Government's interpretation of the Guidelines and the Plan is not persuasive. *See also supra* note 3; *cf. Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986) ("Fundamental to any task of interpretation is the principle that text must yield to context.") (Friendly, J.).

Defendant concedes that the 70-day period has not run out with respect to charges actually contained in the original indictment. Defendant's Reply Memorandum of Law at 3.

No. 87-516

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In the Supreme Court of the United States

OCTOBER TERM, 1987

MARTIN ROMAN, PETITIONER

v.

UNITED STATES OF AMERCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing one count of a superseding indictment on Speedy Trial Act grounds.

On May 6, 1986, petitioner was charged in an eight count indictment returned in the United States District Court for the Southern District of New York. The indictment charged him with conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and with distributing and possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(B). While the indictment was pending, various periods of time were excluded from the 70-day period within which trial must commence under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* On September 5, 1986, petitioner was charged in a superseding indictment that essentially restated the original charges and added a count charging petitioner with managing a continuing criminal enterprise engaged in the distribution of heroin, in violation of 21 U.S.C. 848. Pet. App. 3a-4a.

The district court dismissed the new count on the ground that the Speedy Trial Act time limit for trying that count commenced with the date of the arraignment on the

original indictment and that 70 days had passed without the commencement of trial. The court concluded that the continuing criminal enterprise charge must be considered the same as, or required to be joined with, the conspiracy charge in the original indictment and that the Speedy Trial Act exclusions that applied to the original indictment did not apply to the continuing criminal enterprise charge (Pet. App. 16a-26a).

The court of appeals reversed (Pet. App. 1a-13a). The court held that the 70-day speedy trial period applicable to the original indictment also applies to a superseding indictment that contains charges that are required to be joined with the original charges. However, the court also ruled that the exclusions from the 70-day period that are applicable to the original charges are also applicable to the joined charges in the superseding indictment. Accordingly, the court of appeals held that because of the exclusions applicable to the original charges, the continuing criminal enterprise charge was not barred by the Speedy Trial Act.

Petitioner contends (Pet. 5-12) that the time excluded because of the running of the speedy trial clock may not be retroactively tolled as to a count of a superseding indictment that should have been but was not contained in the original indictment. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment

against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1987

[1] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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